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In The

# Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; AND EDWARD W. MAHER, Individually And In His Official Capacity,

*Petitioners,*

V.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK AND LINDA BROOKS,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

## ARGUMENT

### I.

### THE DISPARATE IMPACT OF THE RESULTS OF THE EMPLOYMENT TEST ON A GROUP TO WHICH THE RESPONDENTS BELONG SHOULD NOT BE EQUATED WITH A DISCRIMINATORY SELECTION PROCESS

The respondents equate the disproportionate or disparate impact of the Welfare Eligibility Supervisor examination on black candidates with a racially discriminatory selection process. (Brief of Respondents, pp. 6-7, 13). In so doing they confuse two separate concepts, that of disparity and that of discrimination. "Disparity" means "dissimilar" or "essentially different." Random House Dictionary of the English Language (1966). The group of blacks who passed the Welfare Eligibility Supervisor examination was distinct or different from the group of whites who passed the examination in the sense that the black group represented 54.17 percent of the blacks who took the examination while the white group represented 79.53 percent of the whites who took the examination. That is not to say, however, that the examination, therefore, discriminated against blacks on account of their race.

To "discriminate" is "to make a distinction in favor of or against a person or thing on the basis of the group, class or category to which the person or thing belongs, rather than according to actual merit...." Random House Dictionary of the English Language (1966). The interpretative memorandum of the bipartisan floor captains for Title VII, Senators Case and Clark, defined "to discriminate" to mean "to make a distinction, to make a difference in treatment or favor...." 110 Cong. Rec. 7213 (1964). Any distinctions which the Welfare Eligibility Supervisor examination made among examinees were made on the basis of the ability to answer the examination questions and were not made on the basis of the race to which any examinee belonged. Nor can it be said that the lower level of performance of the black group was related to their blackness in any way.

That circumstance distinguishes this case from cases such as *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), where the poorer performance of blacks was directly related to their race. In those cases the blacks on whom the employment tests adversely impacted had been segregated by law, on account of their race, in inferior schools in North Carolina. See *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430. North Carolina had, by use of such schools, "systematically deprived its black citizens of the educational opportunities it granted to its white citizens." *Gaston County, North Carolina* v. *United States*, 395 U.S. 285, 296-297 (1969). Connecticut has never had segregated schools and there is no basis for any determination by the Court. There was no determination below that the black respondents in this case received educations inferior to the white candidates on account of their race[1] or that their failure to pass the written examination was in any way whatsoever connected to their race.[2]

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[1]According to the 1970 census, 57 percent of white persons 25 years of age or older in Connecticut had completed 4 years of high school or more and 39.7 percent non-white persons had done so. White persons 25 years of age or over had completed a median of 12.2 years of school and non-whites a median of 10.9 years. U.S. Bureau of Census, 1970 Census of Population: Vol. 1, Characteristics of the Population, pt. 8, Table 46. In contrast, as the Court pointed out in *Griggs*, 34 percent of white males in North Carolina had completed high school according to the 1960 census, but only 12 percent of non-white males had done so. *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 430 n. 6.

[2]In *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) the State of Alabama's 5'2" height requirement and 120 pounds weight requirement for correctional counselors together excluded less than one percent of the male population and 41 percent of the female population. Clearly, height and weight are physically connected to gender. The Court recognized that when it said that there was "no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." *Id.* 433 U.S. at 330. Test performance is not physically related to race.

If persons over forty had done more poorly on the test than others, or American citizens of Italian ancestry had done more poorly than others,[3] the Court would not attribute such results to their age or national origin. Neither should the Court attribute the poor performance of blacks on a test to their blackness, absent the circumstances present in *Griggs* and *Albemarle.* "Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *City of Los Angeles, Dept. of Water* v. *Manhart,* 435 U.S. 702, 709 (1978).

## II.

## THE RESPONDENTS HAVE MISCHARACTERIZED THE PETITIONERS' ACTIONS IN SETTING THE PASSING SCORE OF THE EXAMINATION AND IN MAKING PROMOTIONS AS BEING LITIGATION-ORIENTED

The passing score on this test was set by an objective, standardized method. The petitioner, Department of Administrative Services, generally sets a passing mark by determining, as to each question on the test, the percentage of examinees who answer the question correctly. The petitioner then computes the average of such percentages in order to determine the passing score. (Tr. 278 (May 28, 1980)). That was the method followed in this case. (Tr. 312-313 (May 28, 1980)). This yielded a passing score of approximately 66. The raw score was rounded off at 65 to reduce adverse impact. (Tr. 328 (May 28, 1980)).

It is in this sense, that of sensitivity to equal employment opportunity for minorities, that the petitioners' "affirmative action" should be understood. The respondents, on the other hand, allude to the testimony of the Personnel Director of the

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[3] "[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." *Regents of University of California* v. *Bakke,* 438 U.S. 265, 295 (1978) (Opinion of Powell, J.).

Department of Income Maintenance that promotions were made not only with regard to the examination rankings, but also with regard to supervisory recommendations, affirmative action and job performance (Tr. 248 (May 27, 1980)) and claim that affirmative action was a facade for the arbitrary promotions of minorities to avoid liability. (Brief of Respondents, pp. 5, 7). However, there was no testimony by this or any other witness, or findings by the trier of fact, as to the nature or specifics of any "affirmative action" after the promulgation of the eligibility list. It must, therefore, be concluded that any affirmative action in this regard was in accordance with relevant law, particularly Conn. Gen. Stat. § 46a-70(a) which commands appointing authorities to "recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, [or] color...." See also Conn. Gen. Stat. § 5-195. (Brief of Petitioners, App., pp. 3a, 18a-19a). Any inference that the petitioners discriminated in favor of black persons for whatever reason so as to violate the state law and to subvert the integrity of the personnel system which they are bound to uphold is totally unwarranted.[4]

## III.

## THE RESPONDENTS HAVE MISCONCEIVED THE FOCUS OF THE DISPARATE IMPACT RULE

The petitioners acknowledge that Congress was concerned not only about intentional discrimination against protected class members, but also about the integration of minorities into the skilled workforce and the economic mainstream and wished to eliminate racially-stratified job environments. (Brief of Petitioners, pp. 15-16 and cases cited therein). The petitioners do

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[4]In the absence of clear evidence to the contrary, state officials such as the petitioners are presumed to have discharged properly their official duties. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15 (1926); see also *Balch Pontiac-Buick, Inc.* v. *Commissioner of Motor Vehicles,* 165 Conn. 559, 568, 345 A.2d 520, 525 (1973).

not ask the Court to disregard totally statistics as to how the black group of candidates for Welfare Eligibility Supervisor fared in the selection process in relationship to the white group. But petitioners submit that, consistent with this legislative purpose, the Court should consider the end result of an employee selection process in determining whether to require, under a disparate impact theory, a showing of the job relatedness of any component of that process.[5] If the right of a member of a protected class to relief is to be derived from statistics as to how his protected class fared, then the Court should advert to how such class ultimately fared in the employee selection process, in penetrating the job area in question, rather than to how the protected class fared on a single segment of the process.

> Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has]...a manifest relation to the employment in question. *Griggs* v. *Duke Power Co., supra,* at 432."

*Dothard* v. *Rawlinson, supra,* 433 U.S. at 329.

No one can quarrel with the Court of Appeals' statement upon which the respondents seized (Brief of Respondents, p. 13) that "it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees." *Teal* v. *Connecticut,* 645 F.2d 133, 140 (2d Cir. 1981). However, the Court of Appeals should not have held that the respondents made a prima facie showing that they were "victimized" by racial discrimination merely by establishing that

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[5]The factual issues and the nature of the evidence presented will differ when plaintiff claims discriminatory treatment. See *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 n. 5 (1981).

the test results disparately impacted on their protected class.[6] In characterizing the black respondents as "victimized," the Court of Appeals overlooked the critical consideration that the disparate impact rule allows an individual to establish a prima facie case merely on the basis of statistics concerning the success of the members of a protected class and the individual's membership in that protected class. The rule requires no evidence of the group's, or any individual's, educational opportunities, work background or other life experiences, and no evidence of the relationship of these to failure or success in the employment process; rather the sole criterion for a prima facie case is the success or failure of the individual's protected group. In such circumstances that criterion should be focused upon what Congress focused upon, the success of the group in penetrating the job market. See *E.E.O.C.* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3rd Cir. 1980); *E.E.O.C.* v. *Navajo Refining Co.*, 593 F.2d 988, 991-992 (10th Cir. 1979); *Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978); *Cormier* v. *P.P.G. Industries, Inc.*, 519 F.Supp. 211, 278-279 (W.D.La. 1981); Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C.Central L.J. 1 (1980).

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[6]Had 5 more black applicants passed the examination, and had all other factors remained unchanged, the passing rate of black candidates would have exceeded 80% of the passing rate of white candidates so as to comply with the "eighty percent rule" of the Uniform Guidelines used by the District Court to determine impact. See Brief of Petitioners, pp. 5-6. In such a case no respondent could have made out a prima facie case of disparate impact even under respondents' theory.

## CONCLUSION

If the bare coincidence of relative lack of success of a racial, or religious, or gender, or national origin group in a job quest is to give rise to an inference of illegal discrimination against that group and its members, then the inference should be based on the ultimate success of that group in the job quest. For the reasons stated herein and in the petitioners' brief on the merits, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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